marks of German War Bonds to be delivered to the plaintiff upon arrival from Germany,—defendant having already contracted for the purchase of sufficient bonds from a German bank, to cover the plaintiff's purchase. Although the bonds were not yet issued by the German government, plaintiff paid the full purchase price for the same. War intervened, and the bonds never arrived up to the time of this action; some two years later, the plaintiff sues to recover the purchase price, claiming to have rescinded the sale. *Held,* a valid executed contract of sale, and title having passed, the plaintiff cannot recover,—and even though the contract be executory, the plaintiff must fail. *Erdreich* v. *Zimmerman et al.,* (1920) 179 N. Y. S. 289.

The result reached is correct, provided the court is justified in its fundamental assumption that title had passed, and the contract was executed. But it is apparent that the court was not warranted in making this assumption, because title could not possibly have passed, there being no bonds in existence at the time of the contract, to which such title could attach,—and title could not attach to bonds, to be issued thereafter. *Deutsch* v. *Dunham,* 72 Ark. 141; *Bates* v. *Smith,* 83 Mich. 347; *Andrew* v. *Newcomb,* 32 N. Y. 417; *Maskelinski* v. *Wazsinenski,* 20 N. Y. S. 533. Assuming this to be an executory contract of sale, it seems that the plaintiff should be allowed to recover his purchase money, on the ground that the declaration of war by the United States rendered it void and illegal. It has frequently been held that any exportation to, or importation from, an enemy port is a prima facie trading with the enemy, and therefore executory contracts involving the same are dissolved by a declaration of war. *M'Grath* v. *Isaacs,* 1 Nott & M'C. (S. C.) 563; 2 M'C. L. (S.C.) 26; *Brown* v. *Delano,* 12 Mass. 37. The English cases support this doctrine also, but draw a distinction between these cases and cases where some embargo, or mere temporary restraint is imposed by the government. In the latter cases, they hold that a mere suspension, and not a dissolution, of the contracts results,—on the theory that such restraints are only temporary, whereas no person can forsee the termination of a state of hostilities, for its duration depends, not upon the will of any one government, "but on a number of considerations all of which are as uncertain as any such considerations can be." *Andrew Millar and Company* v. *Taylor and Company,* [1916] 1 K. B. 402; *Reid* v. *Hoskins,* (1855) 4 E. & B. 979; *Avery* v. *Bowden,* (1855) 5 E. & B. 714; *Esposito* v. *Bowden,* (1855) 4 E. & B. 964. These cases hold that carrying of goods to or from an enemy port, even in a neutral vessel, involves prima facie a trading with the enemy. Thus it appears that the contract in the instant case should be considered as dissolved because these goods, the bonds which were the subject of the executory contract, were to be imported from an enemy port, and therefore a trading with the enemy was involved. As to intervening impossibility of performance of contracts, as a defense, see L. R. A. 1916-F. 71.

STATUE OF LIMITATIONS—COUNTERCLAIM GOOD FOR DEFENSIVE PURPOSES THOUGH BARRED BY STATUTE OF LIMITATIONS.—Plaintiff sued on a promissory note for three hundred dollars. Defendant filed a counter-claim, *ex delicto,*

for eight hundred dollars on which the statute of limitations had run after the plaintiff had commenced his action, but before the defendant had filed his counterclaim. *Held*: That defendant could not get an affirmative judgment for the difference, but he could use the barred counterclaim as a defense. *Huggins* v. *Smith,* (Ark., 1919) 216 S. W. 1.

It is well settled that statutes of limitation do not apply to pure defenses, *Louisville Banking Co.* v. *Buchanan,* 117 Ky. 975; *Buty* v. *Goldfinch,* 74 Wash. 532; and some courts have held set-offs and counterclaims not to be barred by the statute, although they would be barred if made the basis of an affirmative action, *Stewart* v. *Simon,* 111 Ark. 358; *Aultman and Co.* v. *Meade,* 121 Ky. 241; but other courts have held that the statute applies as well to a demand attempted to be set-off as to one upon which an action is brought, *Nolin* v. *Blackwell,* 31 N. J. L..170; *Moore* v. *Gould,* 151 Cal. 723; *Woodland Oil Co.* v. *Byers,* 223 Pa. St. 241. If however, the statute has not run against the set-off or counterclaim at the time the plaintiff commenced his action, the defendant's cross action will not be barred by the running of the statute while suit is pending, *Brumble* v. *Brown,* 71 N. C. 513; *McElwig* v. *James,* 36 Ohio St. 152. But in Pennsylvania, the time when the running of the statute is stopped is when defendant files his counterclaim, not when plaintiff commenced his action, *Gilmore* v. *Reed,* 76 Pa. St. 462; *McClure* v. *McClure,* 1 Grant Cas. 222. Nor can plaintiff evade the set-off or counterclaim by dismissing his action and later commencing anew, after the statute has barred the defendant's cross action, *Bertschy* v. *McLeod,* 32 Wis. 205. The principal case follows neither of the above rules, but holds that for the purpose of getting an affirmative judgment, the defendant's cause of action is barred even though the statutory period elapsed while the suit was pending, but that for the purpose of recoupment, "it existed as long as appellant's (plaintiff's) cause of action existed." The court apparently reasoned that since the statute of limitations is inapplicable to defenses (recoupment), and since by statute, set-off and counterclaim are broader than, but nevertheless, include, recoupment, hence a counterclaim must be usable either as a counterclaim or as recoupment as occasion demands. In Utah a statute (COMP. LAWS 1907, sec. 2971) enacts the law as laid down in the principal case, but the Arkansas statute would seem not to justify such an interpretation. The principal case, therefore, appears to be an instance of judicial legislation.

SUPERSTITIOUS USES—BEQUEST FOR MASSES—CHARITIES.—A bequest for the saying of masses *held* valid; not illegal as a superstitious use.—*Bourne* v. *Keane,* [1919] A. C. 815.

A superstitious use has been defined as "one which has for its object the propagation of the rites of a religion not tolerated by the law." 4 HALSBURY'S LAWS OF ENGLAND 120. It is quite evident that in this country there can be, in law or equity, no such thing within the above definition. See *Methodist Church* v. *Remington,* I Watts (Pa.) 218; *Gass* v. *Wilhite,* 2 Dana (Ky.) 170; *Holland* v. *Alcock,* 108 N. Y. 312; although such bequests may be void for other reasons; viz., because involving a perpetuity, *In re Zeag-*